BANK INDUSTRI MALAYSIA BHD.

v.

TOPLACE SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN JC
[SUIT NO: D5-22-130-1995]
23 APRIL 1997

CIVIL PROCEDURE: *Action - Disposal of action without trial - Striking out - Pleadings - Striking out defence - Rules of the High Court 1980, O. 18 r. 19(a), (b) & (d)*

CONTRACT: *Guarantee - Guarantor - Right to benefit of securities - Contracts Act 1950, s. 94*

The present application was by the plaintiff to strike out the defence of the 4th and 5th defendants pursuant to O. 18 r. 19(a), (b) and (d) of the Rules of the High Court 1980, and to enter judgment against the defendants together with interest, late payment interest and costs.

By a letter of offer followed by a loan agreement the plaintiff had granted the 1st defendant ('the company') a term loan facility for RM2 million for the purpose of financing the purchase of a vessel to be operated between Sibu and Kuching. The 2nd to 5th defendants guaranteed the repayment of the loan.

It was an express term of the loan agreement that the company would execute a first priority mortgage over the vessel. For this purpose, the 2nd and 4th defendants executed a statutory mortgage on or about 16 December 1992 and handed the same to the plaintiff for registration. This statutory mortgage, however, was never registered.

Subsequently on 19 February 1994 the defendants resigned as directors of the company and sold their shares in the company to two other individuals. The defendants wrote to the plaintiff and informed the plaintiff of this change and requested that they be discharged as guarantors for the company and that new guarantees be procured from the new shareholders and directors instead. The defendants also requested the plaintiff to inspect the vessel. The defendants' request for discharge was rejected by the plaintiff.

On 3 May 1994, the plaintiff wrote to the company (which letter was not copied to the defendants) stating that they had found out that the vessel had been moved to either Hong Kong or China and requested for further information on this. On or about 16 May 1994 the plaintiff recorded a statutory

mortgage on the vessel. This statutory mortgage was executed by the new shareholders and directors of the company.

Held:

[1] The summary proceedings under O. 18 r. 19 of the Rules of the High Court 1980 was not intended to be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the defendants have a defence to the action. To do that would be to usurp the position of the trial Judge. At this stage, the Court should not be concerned with the merits of the defence. As long as the pleadings disclose some cause of action or raise some question fit to be decided by the Judge, the mere fact that the case would be weak and not likely to succeed at trial, would not be a ground for the pleadings to be struck out.

[2] Based on the terms of the letter of offer read together with the loan agreement, the Court found that it was a condition precedent to the guarantee that the vessel would be operating in the territorial waters of Malaysia and between Kuching and Sibu and that the plaintiff had breached its condition precedent by allowing the vessel to be taken outside the jurisdiction. The defendants cannot be said to have relied on their own breach as a defence because at the time the vessel was taken out of jurisdiction, it was clear that the defendants were no longer directors nor shareholders of the company.

[3] It was also a condition precedent to the guarantee that the plaintiff would register a statutory mortgage on the vessel. The failure of the plaintiff to register the mortgaged executed by the defendants at the time that the mortgage was executed by them on or about 16 December 1992 resulted in the company being able to remove the vessel from the jurisdiction after the defendants had left the company, thereby depriving the defendants of their right to benefit from this security pursuant to s. 94 of the Contracts Act 1950. In such a case, the defendants as sureties were discharged of their surety to the extent of the value of the security.

[4] The present case was not a plain and obvious case which could be disposed off summarily.

[Plaintiff's application dismissed.]

Case referred to:
Mooney & Ors. v. Peat, Marwick, Michell & Co. & Anor. [1967] 1 MLJ 87 ***(refd)***

Legislation referred to:
Contract Act 1950, s. 94
Rules of the High Court 1980, O. 18 rr. 19(a), (b), (d)

For the plaintiff - Shamsul Bahrain bin Ibrahim; M/s. Skrine & Co.
For the 4th & 5th defendant - Fiona Bodipalar; M/s. Sri Ram & Co.

JUDGMENT

RK Nathan JC:

This is an application by the plaintiff to strike out the defence pursuant to O. 18 r. 19(a), (b) and (d) of the Rules of the High Court 1980 (the RHC). This application deals only with the 4th and 5th defendants (the defendants) and the 1st defendant is hereinafter referred to as the company. This application is also to enter judgment against the defendants for the sum of RM1,989,862.85 with interest at the rate of 7% p.a. on monthly rests basis and late payment interest of 2% above the prescribed interest rate from 1 December 1994 until the date of settlement and costs.

Background Facts

By a letter dated 3 November 1992 (the letter of offer) the plaintiff granted the company a term loan facility for RM2 million for the purpose of financing the purchase of a vessel, the MV "Jian Hua Express" (the vessel) to be operated between Sibu and Kuching. By a letter of guarantee executed by the 2nd to 5th defendants, the defendants guaranteed the repayment of the loan. Pursuant to the letter of offer, the plaintiff entered into a loan agreement with the company dated 16 December 1992 (the loan agreement). It was an express term of the loan agreement that the company would execute a first priority mortgage over the vessel. For this purpose, the 2nd and 4th defendants executed a statutory mortgage on or about 16 December 1992 and handed the same to the plaintiff for registration. This statutory mortgage was never registered. On 19 February 1994 the defendants resigned as directors of the company and sold their shares in the company to one Philip Wong Siong Ting and James Wong Barnt Soon. On 12 April 1994 the defendants wrote to the plaintiff informing it of the change in shareholding and requesting that they be discharged as guarantors and that fresh guarantees be entered into between the plaintiff and the new shareholders and directors. By the same letter the defendants requested that the plaintiff inspect the said vessel. On 20 April 1994 the plaintiff replied to the defendants rejecting their request for discharge. On 3 May 1994 the plaintiff wrote to the company (which letter was not copied

to the defendants) stating that the plaintiff had found out that the vessel had been moved to either Hong Kong or China and requesting further information on this. On or about 16 May 1994 the plaintiff recorded a statutory mortgage on the vessel. This statutory mortgage was executed by the new shareholders and directors.

Court's Findings

Since this application is based on O. 18 r. 19(1)(a), it is clear that I ought to consider only the statement of claim and the allegations pleaded therein. In *Mooney & Ors. v. Peat, Marwick, Michell & Co. & Anor.* [1967] 1 MLJ 87, 88 Raja Azlan Shah J (as His Highness then was) said:

> ... So long as the statement of claim discloses some ground of action the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out.

In this case I am also bound by the principle of *mutatis mutandis* to look at the defence. So long as the defence discloses some basis to ground a defence the mere fact that the defendant is not likely to succeed on it at trial is not a ground for the defence to be struck out. Having perused the defence, I find that paras. 2 to 7 do in fact show a defence on the face of the pleading. The defendants aver that it was a condition precedent to the guarantees executed by the defendants that the vessel would remain within Malaysian territorial waters and that the plaintiff would register the statutory mortgage executed by the defendants over the vessel.

On the other two limbs of O. 18 r. 19(1)(b) and (d), it is obvious that it was a condition precedent to the guarantee that the vessel would be operating in the territorial waters of Malaysia and between Kuching and Sibu and that the plaintiff breached its condition precedent by allowing the vessel to be taken outside the jurisdiction. In reply the plaintiff contended, (a) that there was no such condition precedent contained in the letter of guarantee. It is my judgment that the letter of guarantee cannot be read in isolation. It must be read with the other contemporaneous documents. The letter of guarantee was executed by the guarantors based on what was in the letter of offer dated 3 November 1992 sent by the plaintiff to the company. The letter of offer expressly stipulates that the purpose of the loan was to finance the purchase of a catamaran vessel to be operated between Sibu and Kuching. This was the intention of all the parties and was an express stipulation of the plaintiff. This is evidenced by the plaintiff's fax dated 3 May 1994 wherein the plaintiff states "... the loan for the construction of the vessel was approved by the Bank with the assumption that she will be used only in the Sibu-Sarikei-Kuching route."

On the next contention of the plaintiff, (b) that by no stretch of the imagination, the plaintiff as a bank would have allowed its security and assignment to be taken out of the jurisdiction, it is clear from the plaintiff's letter dated 5 September 1994 that when the plaintiff had knowledge of the fact that the vessel had been taken out of the jurisdiction, it was prepared to allow the vessel to be operated in China. The plaintiff's statement (Encl. 20) that "the bank was also willing to consider TSB's plan to operate in China if the route is viable, even though the vessel was supposed to operate in Sarawak" shows clearly that it was a condition precedent that the vessel was to be operated in Sarawak and that the bank was prepared to agree to this vessel being out of the jurisdiction. In respect of the next contention of the plaintiff, (c) that the defendants as guarantors and directors of the company allowed the vessel to be taken out of the jurisdiction and therefore they cannot rely on their own breach as a defence, it is clear from the contemporaneous documents that the defendants were no longer directors of the company when the vessel was taken out of the jurisdiction. In fact the defendants had written to the plaintiff on 12 April 1994 informing the plaintiff that they were no longer directors and asking the plaintiff to inspect the vessel.

It is my considered judgment and I so hold that it was a condition precedent to the guarantee that the plaintiff would register the statutory mortgage on the vessel. It was for this purpose that the defendants executed the statutory mortgage on behalf of the company and handed it to the plaintiff. However, the plaintiff did not register the statutory mortgage. The plaintiff only registered the said mortgage after the vessel had been taken out of the jurisdiction and even then the mortgage that was purportedly registered was a fresh mortgage executed by the new directors of the company and not the mortgage executed by the defendants. It is my judgment that if the mortgage that had been executed by the defendants had been registered by the plaintiff at the time it was supposed to have been registered, the company would not have been able to remove the vessel from the jurisdiction. It is obvious that the plaintiff, having realised its mistake in not registering the mortgage, attempted to rectify the situation by obtaining a fresh mortgage and recording it at the Registry. To me this is nothing more than locking the stable door after the horse has bolted, since the vessel is now out of the jurisdiction and in China.

It is the plaintiff's contention that by the defendants arguing that the statutory mortgage was null and void in that when the mortgage was created the vessel was no longer in Malaysia, the defendants had knowledge that the vessel was taken away to China before the company created the statutory mortgage over the said vessel on 13 May 1994 and which was registered on 16 May 1994. The plaintiff further contends that the defendants had breached cl. 3(10) of

the deed of covenant accompanying the statutory mortgage which was to keep the vessel registered as a Malaysian vessel at the Port of Registry.

I find these suggestions unacceptable. The defendants resigned as directors on 19 February 1994 and sold their shares in the company to Philip Wong Siong Ting and James Wong Barnt Soon. I also find that there is no evidence that the defendants knew that the vessel was out of the jurisdiction before 13 May 1994. If merely by pleading in the defence that the said vessel was out of the jurisdiction when the statutory mortgage was created, it can be inferred as submitted by the plaintiff that the defendants has prior knowledge of the fact that the said vessel was out of the jurisdiction by 16 May 1994, then it would mean that no party can plead facts, the knowledge of which had been acquired, subsequent to the event in issue having occurred.

As for cl. 3(10) of the deed of covenant accompanying the statutory mortgage, this deed is not signed by the defendants but by the company so that there is no question of the defendants breaching the terms thereof. In any event, the said deed, which was executed by the defendants on behalf of the company, was never registered by the plaintiff. It is clear that the said deed which was signed by the new directors was registered after the vessel had been removed from the jurisdiction so much so that the said clause was not even capable of being performed.

It is my finding that the failure of the plaintiff to register the mortgage executed by the defendants at the time that the mortgage was executed, that is on or about 16 December 1992, resulted in the company being able to remove the vessel from the jurisdiction after the defendants had left the company, thereby depriving the defendants of their right to benefit from this security pursuant to s. 94 of the Contracts Act 1950. In such a case the defendants as sureties are discharged of their surety to the extent of the value of the security.

It is my judgment that the summary proceedings under O. 18 r. 19 of the RHC is not intended to be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the defendants have a defence to the action. To do that is to usurp the position of the trial Judge. At this stage, this Court should not be concerned with the merits of the defence. As long as the pleadings disclose some cause of action or raise some question fit to be decided by the Judge, the mere fact that the case is weak and not likely to succeed at trial, is no ground for the pleadings to be struck out. I find that this is not a plain and obvious case which is fit to be disposed off summarily.

In the circumstances, having considered the various submissions and having read all the authorities, I dismissed the application with costs to follow the event. In order to speed up the trial I had fixed this case for case management to 20 January 1997.

Reported by Ling Hea Hoon